Supreme Court, U.S.
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No. 88-1304

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

UNION CARBIDE CORPORATION,
Petitioner,
v.
SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

VILLMAR DENTAL LABS, INC., A CALIFORNIA CORPORATION,
NOWELL'S, INC., A CALIFORNIA CORPORATION, AND
BEAPER, INC., A CALIFORNIA CORPORATION,
Real Parties in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITIONER'S REPLY MEMORANDUM

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Petitioner Union Carbide Corporation ("Carbide") submits this reply memorandum in response to the brief of Real Parties in Interest ("Real Parties") filed in opposition to Carbide's Petition for A Writ of Certiorari ("Petition").[1]

In its Petition Carbide raises two issues: whether California's indirect purchaser statute is preempted by the federal antitrust laws, and whether it violates the Due Process Clause of the Fourteenth Amendment. Real Parties neither address Carbide's arguments nor challenge the Court's jurisdiction to resolve these questions now.[2] They simply suggest that there is no "factual record" for this Court to review and that the preemption and due process issues are not "ripe" for decision. These contentions seriously mischaracterize the record in this case and are without merit.

I. REAL PARTIES' CONTENTION REGARDING THE DESIRABILITY OF ADDITIONAL FACTUAL DEVELOPMENT IS SPECIOUS

Real Parties assert that the Court should not grant Carbide's petition because Real Parties have taken no discovery and the case "is in its early pleading stages."[3] Brief in Opposition to Petition for Writ of Certiorari ("Opposition Brief") at 1. This argument is contradicted by the record.

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[1]Carbide's Rule 28.1 List, Petition at ii, remains unchanged.

[2]Indeed, Real Parties suggest that the Court should grant Carbide's Petition if it does not fully resolve the preemption issue in the pending appeal of *State of California v. ARC America Corp.*, No. 87-1862. *See* Opposition Brief at 3 n.1.

[3]In fact, this case has been pending for over eight years (since January of 1981) while the parties have sought to resolve the same legal issues presented by Carbide's Petition.

Real Parties *stipulated* to stay the action – including all discovery – in the trial court pending disposition of Carbide's summary judgment motion on the preemption and due process issues. Real Parties sought no discovery, either before Carbide's motion was filed or after. Real Parties presented no evidence in opposition to Carbide's motion, disputed none of the evidence submitted by Carbide, and never suggested to the trial court that any additional facts might exist that would bear on the merits of these issues. Rather, Real Parties recognized that, as remains true, the disputed issues are purely ones of law.

Carbide introduced into evidence numerous Statements of Undisputed Material Fact and supporting declarations and exhibits. This evidence established that the indirect purchaser plaintiffs sought recovery for the same alleged overcharges on the same units of industrial gas for which Carbide had already paid direct purchasers in the federal action. Carbide thereby established that any recovery by indirect purchasers in the present action – either by judgment or by settlement – would constitute a duplicative recovery. *See* Petition at 7-11. Real Parties did not object to or dispute a single element of the evidence on which Carbide's motion was based. They did not ask for additional discovery in order to respond. They did not offer any contrary evidence. Indeed, Real Parties admitted the ultimate fact necessary to prove that Carbide faces the risk of duplicative recovery: that they "seek to recover the same alleged overcharges which were the subject of the federal action and which are the subject of the settlement in the federal action."[4] Given this admission, no additional evidence is necessary to support a finding of preemption.

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[4]Record before the California Court of Appeal, Statement of Undisputed Fact No. 12 (Exhibit 4).

Consequently, Real Parties contested Carbide's motion on purely legal, not factual grounds. The trial court denied the motion solely as a matter of stare decisis. No factual question was involved. For Real Parties to now suggest that additional discovery is necessary to determine the preemption and due process issues not only is wrong, but is a fundamental misrepresentation of the history and posture of this case.

II. REAL PARTIES' CONTENTION THAT THE RISK OF DUPLICATIVE LIABILITY IS "SPECULATIVE" IS INCORRECT BOTH AS A MATTER OF FACT AND OF LAW

Real Parties further argue that the threat of duplicative liability is "speculative," contending that there has been "no factual showing that Union Carbide will be subjected to liability of any kind in this state-court action, much less multiple liability." *See* Opposition Brief at 2. Yet the threat of multiple recovery in this case is precisely the same as that in *Illionis Brick Co. v. Illinois,* 431 U.S. 720 (1977) ("*Illinois Brick*"), where indirect purchasers were also seeking recovery after the direct purchasers had settled, and the defendants challenged their right to do so by a motion for summary judgment. In *Illinois Brick* the Court construed congressional intent and found that the federal antitrust laws proscribe not only duplicative liability but the *risk* of duplicative liability. 431 U.S. at 730-31. The Court has repeatedly affirmed this federal policy. *See Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 111 n.6 (1986); *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 544 (1983); *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 474-75 (1982). *See* Petition at 16-17. Moreover, there is no dispute – Real Parties have conceded – that any recovery by the direct purchasers will necessarily be duplicative. In asking the Court to await the actual imposition of a duplicative recovery on

Carbide before addressing the preemption and due process issues, Real Parties ignore the facts and the law of *Illinois Brick*.

III. THE PETITION SHOULD BE GRANTED

Real Parties *concede* that it would be appropriate for the Court to grant Carbide's Petition if the Court does not fully resolve the preemption issue in the pending *ARC America* appeal. *See* Opposition Brief at 3 n.1. As Carbide noted in its Petition at 7-9, however, the instant case presents the preemption issue in a different and clearer posture than does *ARC America*. In contrast to *ARC America*, no court here has jurisdiction over both direct and indirect purchasers; any recovery by the indirect purchasers necessarily will be duplicative of the direct purchasers' prior recovery in the federal action. Accordingly, this case presents the Court with an opportunity to fully address all aspects of the preemption question. Thus, Petitioner respectfully requests the Court to consider this case in conjunction with the pending appeal in *ARC America*.

Dated: March 10, 1989

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